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Supreme Court of the United States

OCTOBER TERM, 1937

ARKANSAS LOUISIANA GAS COMPANY .... *Appellant,*

v. No. 645

DEPARTMENT OF PUBLIC UTILITIES, THOMAS FITZHUGH, H. W. BLALOCK AND MAX H. MEHLBERGER, COMMISSIONERS .... *Appellees.*

BRIEF FOR APPELLEES

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CASES CITED

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BRIEF FOR APPELLEES

STATEMENT

This is an appeal from a decision of the Supreme Court of Arkansas affirming an order of the Department of Public Utilities of that state requiring the appellant to file with the Department schedules showing rates charged for natural gas sold and delivered in Arkansas to those who are referred to in this record as pipe line industrial customers.

In Arkansas the appellant is engaged as a public utility in the business of transportation, distribution, and sale, of natural gas to the public for compensation. In furtherance of its business as a public utility appellant owns and operates a pipe line system in Arkansas through which gas is distributed and delivered to 415 pipe line customers classified as: city distribution plants owned and operated by appellant, 55; rural consumers using gas for industrial purposes, 40; foreign owned city distribution plants, 2; and

rural domestic consumers, 318. The gas sold to the forty rural consumers for industrial purposes, and to the two foreign owned city distribution plants are the sales involved in this action. These customers throughout the record have been referred to as pipe line industrial customers.

The appellant takes the position that the sale and delivery of gas to its pipe line industrial customers are transactions in interstate commerce and are, therefore, not subject to state regulation.

Appellees concede that the gas, sales of which are involved in this action, was once in interstate commerce, but contend that appellant, after the gas is in Arkansas, changes the form of the package in interstate commerce, thereby destroying its integrity as an original package, and with respect to the distribution and delivery of the gas engages in such local activities that the gas loses its immunity from local regulation while the property of, and in the possession and control of, appellant. Therefore, the question for solution in this case is, Does the gas sold by appellant to its pipe line industrial customers, after being transported into Arkansas, and before it reaches the point of delivery, and where title passes, lose its interstate character? There is no dispute about what the appellant actually does to and with the gas in Arkansas. The controversy is over the legal conclusions to be drawn from appellant's treatment and handling of the gas after it reaches the state. If the sales of gas to the pipe line industrial customers are transactions in intrastate commerce, the cause should be affirmed. On the other hand, if the transactions are found to be interstate commerce and not subject to regulation by the State of Arkansas, the cause should be reversed.

The Department of Public Utilities found that the sales of gas to appellant's pipe line industrial customers were intrastate commerce, subject to local regulation. The finding and order of the Department is lengthy and is found in the record beginning on page 186.

The Department of Public Utilities and the Supreme Court of Arkansas based their conclusions that the sales in question were intrastate commerce upon the following state of facts:

The appellant owns and operates a pipe line system extending over a large part of Northern Louisiana, Eastern Texas and South Arkansas. By means of this system it distributes natural gas in the three states. A better understanding of the extent and layout of the properties in the three states, and especially in Arkansas, is shown by the plat found in the record on page 136-a. This plat shows that the appellant has four transmission lines crossing into Arkansas from Louisiana, designated as Lines A, C, H and K. Line C was not in use at the time of the hearing, therefore, no further reference was made to that line (R. 108 and 188).

Line A extends from the Rogers Compressor Station in Northwestern Louisiana to Little Rock. It crosses the line between the states near the southwest corner of Arkansas. Line H extends in a northwesterly direction from the Richland gas fields in Louisiana (shown near the lower right-hand corner of the plat) to what is shown on the plat as Crusader Station No. 1 in the "Enlarged Section of the El Dorado District." Line K also begins in the Richland fields, crosses the line between the states just east of Line H

and extends to Camden, Arkansas, through the maze and network of lines shown in the El Dorado District. At Camden it connects with a smaller line, designated as KM-6, which extends to Fordyce. The plat (R. 136-a) shows that the Camden company is actually served off of KM-6. However that may be, only a portion of the gas reaching Camden through Line K is delivered there for the reason that the towns of Bearden and Fordyce, which are northeast of Camden, are served by Line KM-6. By means of Lines E and E-1, Lines A, H and K are interconnected (R. 33).

The plat further shows that there are extended from each of the interstate lines, and from their interconnecting Lines E and E-1, many subsidiary or spur lines. These subsidiary or spur lines are constructed and used to draw gas from said interstate and interconnecting lines and to distribute it to numerous points in Arkansas for the purpose of serving some 415 (R. 135) pipe line customers. Some of the points at which these customers are served are remote from the interstate and connecting lines. These customers are classified in the record as follows: city distribution plants owned and operated by appellant, 55; industrial pipe line customers, 40; rural domestic customers, 318; and foreign owned city distribution plants, 2 (R. 135). The customers enumerated do not include any of those served by appellant through its fifty-five city distribution plants.

The two foreign distribution plants are owned by the Camden Gas Company and the Consumers Gas Company. These corporations supply gas to the cities of Camden and Hot Springs, Arkansas, respectively. The latter company is an affiliate and the former independent of the appellant. Gas sold to the forty rural industrial customers and to the

two foreign city owned distribution plants are the sales involved in this action, and which appellant claims are not subject to local regulation because they are transactions in interstate commerce.

On the three interstate mains, their interconnecting, subsidiary and spur lines, there are 382 service taps. The 415 pipe line customers are served through 282 of these taps. One hundred of such taps at the time of the hearing before the Department were not in use (R. 136). From each service tap extends service or supply lines to the premises of the customer. On each of these service lines near the service tap is set a regulator, and on the premises of the customer a meter. The regulator is between the service tap and the meter. The service or supply line from the tap to the customer's premises, the regulator, and the meter, are owned, installed, and maintained by the appellant. The regulator is an appliance that reduces the pressure of the gas, thereby expanding its volume (R. 44) from that found in the main, spur, or subsidiary line, usually ranging from 75 pounds to 200 pounds per square inch (R. 185) to that required by the customer, ordinarily ranging from 8 ounces to 40 pounds per square inch (R. 44-46). Gas is delivered to the Consumers Gas Company at Hot Springs and to the Camden Gas Company at Camden at the average pressure of 23 pounds (R. 51) and 21 pounds (R. 54), respectively. The meter is installed for the purpose of measuring the volume of gas used by the customer. The point of delivery of gas, and the passing of title thereto, is the outlet side of the meter (R. 184).

Gas passing from the interstate mains into the subsidiary or spur lines is not returned to the mains, and the

gas passing through a regulator into a service line cannot be returned to the line whence it was drawn (R. 55).

Any quantity or volume of gas moving into Arkansas through Line A is divided and separated into at least 125 parts; that moving through Line H is divided and separated into 169 separate parts, and that moving through Line K is divided and separated into 104 parts before all of the gas moving through either line completely passes from the system (R. 135). On Line A the first division and separation occurs at Doddridge just north of the Arkansas-Louisiana state line (R. 29). The first separation on Line H occurs at the junction of said line with Line HM-3 which serves the El Dorado distribution plant and numerous industrial plants located south of El Dorado (R. 136-a). The first division or separation of gas passing into Arkansas through Line K is for the purpose of serving the town of Strong in Union County, Arkansas (R. 136-a). The process of division and separation is repeated at each service tap along each of the mains, subsidiary or spur lines, and their connecting lines. A portion of every quantity of gas that is transmitted into Arkansas is diverted and withdrawn from the remainder at the first, and each subsequent service tap on the main, subsidiary or spur lines (R. 77-78).

If the gas delivered to the Camden Gas Company entered Arkansas through Line A the volume so entering would be divided and separated fifty times before any thereof would reach Camden. If it came through Line H the volume entering Arkansas would be divided and separated thirty-seven times before any thereof would reach Camden, and if through Line K the volume entering Arkansas would be separated and divided twenty-eight times before reach-

ing Camden (R. 54). If the gas delivered to the Hot Springs distribution plant came into Arkansas through either of the interstate Lines A or K it would respectively be separated and divided thirty-eight (R. 41) and forty-nine times (R. 42) before any part thereof would reach the Hot Springs plant.

All the gas transported into Arkansas by appellant is consumed in the state with the exception of relatively small quantities delivered to consumers through city distribution plants in Texarkana, Texas, and Junction City, Louisiana (R. 60 and 108). All gas brought into Arkansas is parceled out where the demand therefor exists. That demand exists at the various service taps (R. 37).

Appellant employs a gas dispatcher who, by reason of experience and consultation of weather reports and other available information, is able to reasonably estimate the demand for gas in not only the system in Arkansas, but in Texas and Louisiana. He accordingly directs the movement of gas into and in these states. At the time he dispatches gas into Arkansas he does not know with certainty what particular customer will use any part of it. He only undertakes to supply sufficient gas to meet the demand of the Arkansas system (R. 65). The movement of gas is controlled and regulated by the requirements of the customers (R. 104).

Appellant will serve any customer with gas from its pipe lines, their subsidiaries or spurs, who can economically be served and is financially able to pay for the service (R. 116-117). Gas is transported into Arkansas and is handled and moved in the Arkansas system in such a manner that there is always gas at the customer's meter if and when he needs it (R. 61).

Gas is not stored in Arkansas, if storage means that it comes to rest, because it is continually moving in the lines (R. 104).

The pipe line industrial customers of appellant, consisting of forty pipe line consumers and the two distribution plants, are supplied under separate contracts signed by the appellant at its home office in Shreveport, Louisiana. These contracts vary as to the charges for gas and in other immaterial respects. They provide that the title to the gas passes to the customer at the outlet side of the meter installed on his premises and do not require the customer to take any specific quantity of gas within any given time. He is merely required to take gas in sufficient quantities to meet the requirements of his distribution or industrial plant. The contracts usually provide for a stipulated monthly minimum charge, or a charge for readiness to serve, without regard to the quantity of gas consumed (R. 141-186).

With respect to these contracts Mr. Hamilton, rate engineer for the appellant, said, "The minute the gas is delivered it becomes a contract for sale. That is the intention of the contract" (R. 114). This witness further said, "Each one of these contracts provides for a minimum delivery of gas. That certainly would be a direct contract of sale because we deliver the gas to the customer, and if he doesn't want it he pays for it anyway." "As a part of each one of these contracts the company undertakes to supply the customer at the time he needs gas and at the pipe line tap." "The gas is continually moving. When he [the customer] needs it, we divert it to his use" (R. 114-115).

SUMMARY OF POINTS AND AUTHORITIES

I.

Commodities in interstate commerce become subject to state regulation when the original package is broken and its contents exposed to sale.

Mutual Film Corporation v. *Industrial Commission,* 236 U. S. 230.

Packer Corporation v. *Utah,* 285 U. S. 105.

Pacific States Box & Basket Company v. *White,* 296 U. S. 176.

Atlantic Coast Line Railway Company v. *Standard Oil Company,* 275 U. S. 257.

Mexican Petroleum Company v. *South Portland,* 121 Me. 128, 115 Atl. 900.

Askren v. *Continental Oil Company,* 252 U. S. 444.

II.

The original package doctrine has been applied to natural gas transported in interstate commerce in determining when such commerce ends and intrastate commerce begins.

State v. *Flannelly,* 96 Ka. 372, 152 Pac. 22.

West Virginia & Maryland Gas Company v. *Towers,* 134 Md. 137, 106 Atl. 265.

East Ohio Gas Company v. *Tax Commission,* 283 U. S. 465.

Southern Natural Gas Corporation v. *Alabama,* 301 U. S. 148.

South Carolina Power Company v. *Tax Commission,* 52 Fed. (2) 515, 60 Fed. (2) 528.

III.

The original package of gas transported into Arkansas by appellant is broken and its contents handled, treated and distributed in such a manner that all the gas becomes subject to state regulation, irrespective to whom any part of it is sold and delivered.

State v. *Flannelly*, 96 Ka. 372, 152 Pac. 22.

West Virginia & Maryland Gas Company v. *Towers*, 134 Md. 137, 106 Atl. 265.

East Ohio Gas Company v. *Tax Commission*, 283 U. S. 465.

Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148.

South Carolina Power Company v. *Tax Commission*, 52 Fed. (2) 515, 60 Fed. (2) 528.

IV.

The continuous movement of gas in the pipe lines cannot keep it in the field of interstate commerce.

West Virginia & Maryland Gas Company v. *Towers*, 134 Md. 137, 106 Atl. 265.

South Carolina Power Company v. *Tax Commission*, 52 Fed. (2) 515.

V.

The contracts between appellant and its industrial pipe line customers cannot change the gas sold them from intrastate commerce to interstate commerce.

Atlantic Coast Line Ry. Company v. *Standard Oil Company*, 275 U. S. 257.

VI.

Supplying natural gas to local consumers is a local business subject to local regulation.

Missouri ex rel. Barrett v. *Kansas Natural Gas Company*, 265 U. S. 298.

East Ohio Gas Company v. *Tax Commission*, 283 U. S. 465.

Southern Natural Gas Corporation v. *Alabama*, 301 U. S. 148.

ARGUMENT

I.

Commodities in interstate commerce become subject to state regulation when the original package is broken and its contents exposed to sale.

Articles of commerce are not, because of their origin, entitled to permanent immunity from the exercise of state regulatory power. *Packer Corporation* v. *Utah*, 285 U. S. 105; *Pacific States Box & Basket Company* v. *White*, 296 U. S. 176. All commodities transported into a state for sale, use, or consumption therein necessarily lose their freedom from and become subject to state regulation some time after their introduction into the state. *Mutual Film Corporation* v. *Industrial Commission*, 236 U. S. 230. When an article in interstate commerce loses the characteristics of that commerce and becomes subject to local regulation "must be determined by the essential character of the commerce and not by mere billing and forms of contract," and such determination "is a matter of weighing the whole group of facts in respect to" the transaction involved. *Atlantic Coast Line Ry. Company* v. *Standard Oil Company*, 275 U. S. 257, 268-269.

The Supreme Court of Maine in *Mexican Petroleum Company* v. *South Portland*, 121 Me. 128, 115 Atl. 900, has very clearly set forth the rule for determining when the original package is broken and when interstate commerce ends and intrastate begins: "The test is whether the integrity of the entire package, that is, the imported commodity and the receptacle in which it was imported has been preserved. If so, the Federal Constitution says 'Hands Off';

but if a separation has taken place and the integrity is not preserved, then the constitutional inhibition is at an end. The importer can only deal with goods as a whole, as an entirety, if he wishes them to retain immunity. He cannot change the form of the package, nor open it, except perhaps to test its quality, nor draw from it, nor sell parts of it."

In the case of *Askren* v. *Continental Oil Company*, 252 U. S. 444, this Court held that gasoline brought into a state in tank cars, barrels, and packages, and sold in such, was not subject to local regulation, but that sales from the tank cars, barrels or packages in quantities to suit the needs of the purchaser are sales from broken packages and are subject to local regulation and taxation. Many other cases to the same effect might be cited.

II.

The original package doctrine has been applied to natural gas transported in interstate commerce in determining when such commerce ends and intrastate commerce begins.

Natural gas imported into a state for consumption therein becomes subject to state regulation under the same circumstances and conditions that apply to any other article of commerce. *State* v. *Flannelly*, 96 Ka. 372, 152 Pac. 22; *West Virginia & Maryland Gas Company* v. *Towers*, 134 Md. 137, 106 Atl. 265; *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465; *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148; *South Carolina Power Company* v. *Tax Commission*, 52 Fed. (2) 515, 60 Fed. (2) 528. In each of these cases the court very definitely applied the original package doctrine in determining that natural gas was no longer in interstate commerce and had become subject to local regulation.

III.

The original package of gas transported into Arkansas by appellant is broken and its contents handled, treated and distributed in such a manner that all the gas becomes subject to state regulation, irrespective to whom any part of it is sold and delivered.

In the case of *State* v. *Flannelly,* 96 Ka. 372, 152 Pac. 22, the court said, "The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. * * * Interstate commerce is at an end when the bulk of the imported gas is broken up."

In the case of *West Virginia & Maryland Gas Company* v. *Towers,* 134 Md. 137, 106 Atl. 265, the court said, "The gas when it leaves the main lines where it is separated from the bulk of gas in such lines and forced into the intermediate lines and pipes of the individual consumers, where it cannot return to the main line, and where it remains until used, is, we think, such a breaking of the original package as to remove it from interstate commerce and to make it subject to state legislation, and consequently a subject for regulation by the Public Service Commission of this state in respect to the powers granted the Commission." The court in this case further said, "Whether the gas is separated from the general bulk of gas and confined in the intermediate pipe lines where it cannot return to the main pipe line, and where it must remain until consumed, or *whether it is so separated and stored in tanks awaiting consumption,* the effect is the same, in our opinion, in determining the question whether the original package has been broken and the gas mixed with the common mass of property in this state." (Italics ours.)

In the *East Ohio Gas Company* v. *Tax Commission* case, 283 U. S. 465, the court said (p. 471), "But when the gas passes from the distribution lines into the supply mains it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies. Its volume is thereby expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated, the gas in such lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package for shipment in interstate commerce, in order that its contents may be treated, prepared for sale, and sold at retail."

These cases are conclusive that the original package is effectually broken and interstate commerce is at an end when the gas is turned into city distribution plants.

The later case of *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, very definitely holds that the original package in interstate commerce is effectually broken and that such commerce is at an end when gas is turned from an interstate main into appliances serving rural industrial consumers. In the Southern Natural Gas case the gas was, by means of interstate lines, piped from Louisiana through Mississippi and Alabama into Georgia. In Alabama the pipe line company had four customers, three public utilities engaged in the distribution of gas through city plants, and one industrial consumer. The court, after noting that in the East Ohio case the gas was

diverted and delivered into a city distribution plant, while in the Alabama case it was diverted and delivered into appliances serving an industrial consumer, said (p. 155) that, "While the facts of the two cases are not the same, there is a clear analogy. * * * We perceive no essential distinction in law between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the East Ohio Gas Company case to constitute an intrastate business. As was said in that case, "The treatment and division of the large compressed volume of gas is like the breaking of an original package after shipment in interstate commerce in order that its contents may be treated, prepared for sale, and sold at retail."

In determining that the distribution of electric energy transported into a state for consumption therein is subject to state regulation, the original package doctrine has been applied. In the case of *South Carolina Power Company* v. *Tax Commission*, 52 Fed. (2) 515, the court, on application for an interlocutory injunction, refused to restrain the collection of a tax levied upon the sales of electricity generated without and brought within a state by means of high voltage transmission lines where it was distributed and sold to customers. In denying the restraining order the court said, "The tax is not imposed upon the high voltage current which passes in interstate commerce. It is imposed upon the low voltage current which is sold to the consumer and is an excise tax on the business of selling that current. The high voltage current which comes into the state is not sold. It is used to induce in the transformer the low voltage current that is sold. Even if the current sold be considered as

the current which is brought in, it has gone through a process in which it has been broken up or changed from one current of high voltage to many currents of low voltage, sold within the state, upon the sale of which the tax is levied. While the electric current can hardly be said 'to come to rest' within a state, its interstate journey ends at the transformer which uses it for the production of low voltage currents for use within the state. The situation is the same in principle as the breaking of the original package after shipment in interstate commerce, or the breaking up of a cargo of oil after its interstate journey and the sending of it in tank cars to points where needed within the state, *Atlantic Coast Line Ry. Co.* v. *Standard Oil Company*, 275 U. U. 257, or the distribution of gas in low pressure pipes after it has been brought into a state in high pressure pipes in interstate commerce. *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465.'' The order of the court denying the interlocutory injunction was affirmed by this Court *per curiam*. *South Carolina Power Company* v. *Tax Commission*, 286 U. S. 525. On final hearing the complaint was dismissed. 60 Fed. (2) 528.

There was injected into the case at the later hearing sales of current at high voltage and without transformation at wholesale to a municipality for resale. In discussing this feature, Parker, Circuit Judge, speaking for the Court (p. 529), said, "The fact remains that the lines which supply the town of McCormick and the mills in question are lines maintained for the local distribution and sale of electric current; and when current brought in from another state is placed on these lines for local distribution and sale, it loses its interstate character. It makes no difference that

delivery is made to the local customer at high voltage. The quantity of current is measured, not in volts but in amperes; and when current is drawn off the lines the "original package" is broken and the amperage remaining on the lines is reduced.

"The line to McCormick, for instance, carries the current which the power company uses to supply its customers in Meriweather, Modock, Parkville and Plum Branch. The current which the line carries is broken up for sale to these various users and the town of McCormick obtains only a part of the current on the line. The situation present is not different in principle from that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail. No one would question the power of the state to tax the business of such a dealer."

The analogy of the facts in the case at bar and of those in the South Carolina Power case is striking. In the Power Case energy was distributed to mills (industrial consumers) to consumers served through city distribution plants, and to municipalities for resale. In the case at bar appellant delivers gas to the same class of customers, if there is no distinction, and there is not, between a municipality purchasing for resale to consumers through city distribution plants and corporations purchasing for the same purpose. Some of the current in the power case was delivered at high voltage. None of the gas in the case at bar is so delivered. In the Power Case electric current was carried on wires built and maintained to distribute it after it was transported into the state. In the case at bar gas is carried through pipe lines built and maintained to distribute it after it is transported into the state.

The appellant, after the gas reaches Arkansas, opens and changes the form of the original package—takes part of this package to widely separated points and sells it upon demand. The distribution of gas brought into Arkansas by the interstate mains begins immediately, or at least in a short while, after it reaches the state, and part of it passes into a subsidiary or spur line from which it does not return to the mains. All of it, in separate portions, passes from either the main, subsidiary or spur lines through service taps and regulators where its pressure is reduced and its volume expanded, and thence into supply lines where it is metered and delivered to the customer. It is difficult to conceive of a more systematic and complete breaking of an original package in interstate commerce than that which takes place with respect to the gas delivered by appellant to its customers after it reaches the State of Arkansas.

For all practical purposes appellant's pipe line system in Arkansas is an extensive and extended local distribution system—local in the sense that it is used only for the distribution of gas in Arkansas. The system was built, is maintained, and used to distribute natural gas locally in Arkansas after it has been transported into the state. It is not a facility used in interstate commerce but only for local distribution. In law there can be no distinction between the sale of gas by the appellant to any of its pipe line customers and the sale of gas to a customer through a city distribution plant.

Every physical fact and circumstance found and influencing the result in each of the cases of *State* v. *Flannelly*, 96 Ka. 372, 152 Pac. 22; *West Virginia & Maryland Gas Company* v. *Towers*, 134 Md. 137, 106 Atl. 265; *East*

Ohio Gas Company v. *Tax Commission*, 283 U. S. 465; *South Carolina Power Company* v. *Tax Commission*, 52 Fed. (2) 515, 60 Fed. (2) 528, and *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148, are present in the case at bar. If recognition is given to the principles announced in these cases, the sales of gas by appellant to its pipe line industrial customers is intrastate commerce and subject to local regulation.

At this point we wish to mention the fact that the State of Arkansas is not attempting to regulate the sale or the transportation of the high pressure gas while in interstate commerce. The high pressure gas is not offered for sale or sold. No one can use it. The state merely seeks to regulate the sale of low pressure gas which results from the treatment and division of the high pressure gas after it is in the state.

There is another circumstance in this record that certainly results in an anomalous situation if the sale and delivery of gas by appellant to its pipe line industrial customers is not subject to local regulation. In this connection it will be remembered that of the 415 pipe line customers, some 318 are what are classified as "rural domestic customers." The appellant admits that the sale and delivery of gas to these customers is subject to local regulation, but denies that the state has the power to regulate its sales to the industrial pipe line customers. The gas served the rural customers has the same origin, is transported into Arkansas at the same time, is delivered from the same lines, under similar physical conditions, and by means of the same character of facilities and appliances as the gas sold and delivered to the pipe line industrial customers. The only ex-

planation given by the appellant of its apparently inconsistent positions is that the rural domestic customers are not served under contract while the industrial pipe line customers are so served; that the employees of appellant's distribution department look after the service to the rural domestic customers while a different set of employees attend to the industrial pipe line customers, and that the industrial customers pay their bills directly to appellant's home office, while the domestic customers pay their bills to the nearest city distribution plant. Were the suggestions of appellant followed, a distinction without a difference would be made, and form, rather than substance, would control.

In the Southern Natural Gas case (301 U. S. 148) pipes had been laid from the transmission line to and on the premises of the consumer. This fact appellant contends, distinguishes that case from the case at bar. Upon principle the facts in the two cases are not distinguishable. In its brief (p. 41) appellant admits as much for it says its "pipe line industrial customers receive their gas from appellant's transmission lines or from a spur built therefrom to the customer's premises." When it is recalled that in order to serve the pipe line customers appellant makes a tap upon its main, subsidiary or spur line from which the customer is served, installs a regulator and a meter and lays a supply line to the customer's premises through all of which gas is delivered to the customer, it will be seen that the appellant engages in a local activity not distinguishable from that engaged in by the pipe line company in the Southern Natural Gas case. While the facilities installed by appellant to serve each of its pipe line industrial cus-

tomers may not be as extensive and elaborate as those found in the Southern Natural Gas case, they are, nevertheless, local distribution facilities.

A reference to the contracts which the appellant has with its pipe line industrial consumers shows that the facilities it installs for the purpose of serving some customers are large and expensive. For the purpose of serving the Portland Cement Company appellant agreed to build twenty-one miles of 10-inch line extending from its main transmission Line A to the plant of the cement company. (R. 163). While the contract with the International Paper Company does not show what facilities appellant installed to serve this company, it does show that appellant contracted to install all necessary supply lines, regulators and meters (R. 165). The contract with the Arkansas Bauxite Corporation shows that the appellant expended in the construction of service facilities the sum of $5,000 (R. 180). In Sections 2 and 4 of the "Terms and Conditions" (found on page 184 of the record, and made a part thereof by paragraph 5 of the stipulation, R. 139), applicable to practically all of the contracts which appellant has with its pipe line industrial consumers, it was recognized that it would be necessary for appellant to place "meters, appliances, equipment, etc.," in order to supply the service. We, therefore, repeat that incident to the service of each of its pipe line industrial customers the appellant engages in a local activity similar in all respects to those mentioned in the Southern Natural Gas case.

Appellant cites two cases that hold that the sale of gas to the pipe line industrial customers who are consumers is interstate commerce. They are, *Cities Service Gas Co.* v.

Public Service Commission, 337 Mo. 809, 85 S. W. (2) 890, and *Pan Handle Pipe Line Company* v. *Public Service Commission*, 93 S. W. (2) 675, (also a Missouri case but not in the official reports). The conclusions in the Missouri cases are in irreconcilable conflict with the principle announced in the Southern Natural Gas case. In the brief of the appellant in the Southern Natural Gas case (301 U. S. 148) the decision in the Pan Handle case was called to the attention of this Court. In its opinion the court refused to adopt, follow, or even discuss the case. Therefore, the Missouri cases must again be passed.

In its brief appellant cites many other cases as authority tending to sustain its position. An examination of these cases discloses that some of them involved the transportation and delivery of natural gas. None of them involved the sale and delivery of natural gas to consumers. Those that did involve the transportation of natural gas held that natural gas transported from one state to another by means of a pipe line is interstate commerce and that its sale and delivery directly to a city distribution company is made in such commerce. Many of these cases were cited in the brief of appellant in the Southern Natural Gas case (301 U. S. 148). The court refused to follow or apply the principles in those cases to the facts and circumstances found in the Southern Natural Gas case.

In the cases cited by the appellant, and especially the cases of *Barrett* v. *Kansas Natural Gas Company*, 265 U. S. 298; *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550; *Public Utilities Commission* v. *Landon*, 249 U. S. 239, and *Public Utilities Commission* v. *Attleboro Steam & Electric Company*, 273 U. S. 83, the interstate

movement of the commodity had not ended when the state's power was asserted. In the case at bar the integrity of the large compressed volume entering the state is not thereafter maintained. Before the state attempts to assert its power this volume is broken and relieved of most of its pressure, and parts of it are sent through distribution and supply lines to many widely separated points as and when needed by the consumers and distribution plants. The distinction which we insist upon was clearly recognized in the cases mentioned. The treatment of the gas after it reaches Arkansas ends interstate commerce, and is the beginning of intrastate commerce.

The facts and circumstances incidental to the sales of gas to the Camden and Hot Springs companies are in all respects exactly the same as those incident to the sales to the other pipe line industrial customers. Therefore, if the sale of gas to any of these customers is subject to state regulation, the sales to all of them are. The industrial customer purchases for consumption, while the distributing company purchases for resale. With respect to the sales to the distributing companies, the language of Judge Parker applies with much force. He said: "The situation presented is not different in principle from that of a dealer who brings into the state a cargo of fertilizer in bulk and sells it partly at wholesale and partly at retail." *South Carolina Power Co.* v. *Tax Commission*, 60 Fed. (2) 528, 529.

The fact remains that the facilities through and by which the gas delivered from the interstate transmission mains to the two distributing companies are maintained for local distribution; and when a part of the gas brought into the state is placed in these facilities for such distribu-

tion it loses its interstate character and becomes subject to local regulation. *South Carolina Power Co. v. Tax Commission*, 60 Fed. (2) 528.

The appellant leans heavily upon *State Tax Commission v. Interstate Natural Gas Company*, 284 U. S. 41, to sustain its position that the sales to the Camden and Hot Springs companies are transactions in interstate commerce. The facts in this case and in the case at bar have no similarity whatever. In the Tax Commission case there was a large pipe line extending from the gas fields in Northern Louisiana through Mississippi and again into Louisiana. This line delivered daily to distributors in Southern Louisiana seventy to seventy-five million cubic feet of gas, all of which passed through the State of Mississippi. In Mississippi there were only two taps on this line through which a quarter to a half million cubic feet of gas was daily delivered to two distributing corporations. The gas flowed continuously through the line into and out of the State of Mississippi. Everything done by the pipe line company in Mississippi was incidental to interstate delivery. In the case at bar, all the gas brought into Arkansas is for distribution, delivery and consumption in the state. Everything done by the appellant with respect to this gas after it reaches Arkansas is incidental to local distribution and delivery. In the Tax Commission case there were not hundreds of taps through which hundreds of consumers in widely separated localities in Mississippi were served. In Arkansas the reverse is true.

The Tax Commission case was offered by appellant in the Southern Natural Gas case as authority sustaining its position. The court, in disposing of the contention that the

Tax Commission case should be followed in the Southern Natural Gas case, said that the decision in the Tax Commission case "Rested upon the conclusion that what was done was only incidental to interstate commerce between Louisiana and Mississippi. There were no such local activities as are presented here to carry the transactions of the company into the field of state authority."

We insist that the Tax Commission case can have no bearing upon the questions involved in the case at bar because the facts and circumstances of the two cases are not analogous.

IV.

The continuous movement of gas in the pipe lines cannot keep it in the field of interstate commerce.

Appellant insists that because the gas is continually moving and does not come to rest in its pipe lines from the time it crosses into Arkansas and is delivered to its customers, it remains in interstate commerce, notwithstanding the fact that the original package has been effectually broken.

At this point we wish to note a statement made by the appellant on pages 24 and 26 of its brief wherein it points out that the Supreme Court of Arkansas erred in making certain factual statements. The statement referred to is that "At all times there is a supply of gas in the thousand miles of mains. This reserve is estimated to be about fifty million cubic feet, or an amount sufficient to meet requirements for several hours" (R. 236-237).

Mr. Hamilton, a witness for appellant, admitted that the minimum time for the transmission of gas from the Ar-

kansas-Louisiana state line to Little Rock, the fartherest extremity of the system in Arkansas, would be about six hours, and that such time of transmission would vary from six to ten or twelve hours (R. 102). If it takes from six to ten or twelve hours to move gas from the Arkansas-Louisiana line to Little Rock there would have to be in the lines in Arkansas a supply of gas sufficient to meet the demands of the customers for that length of time, else service would stop. It is a physical impossibility to have uninterrupted service throughout the system and not have at all times in it from six to ten hours' supply of gas. As fast as the gas is withdrawn from the pipe line system, other gas is forced into it for the purpose of replenishing a diminishing supply. At times gas is taken out of the system faster than it is put into it, and at other times it is put into the system faster than it is taken out (R. 122-123).

Thus, it is shown that the Supreme Court of Arkansas was correct when it said there is always in the system "an amount at all times to meet requirements for several hours." The statement by the court does not imply that the gas comes to rest. It is not important whether it does or not. It is important, however, that there is at all times six to ten or twelve hours' supply of gas in the lines in Arkansas.

The fact that the gas is constantly moving in the pipes does not keep the Arkansas system from being a reservoir, a tank so to speak, in which there is six to twelve hours' supply of gas at all times. In this reservoir gas, of course, is constantly moving because it is constantly moving into and out of it. The situation is in all respects similar to that found in *Atlantic Coast Line Ry. Company* v. *Standard Oil Company*, 275 U. S. 257.

While it may be true that gas in the pipe lines is constantly moving on its way to the customer from its point of origin, this fact can in nowise have an effect upon the results in this case. Because of its nature, it is a well known fact that the gas in a city distribution plant is constantly moving. If the fact that gas is constantly moving in the pipe and service lines can change the effect of breaking the original package by the separation of a part of the moving mass from the remainder, the principle announced in the East Ohio and other cases must be overruled.

It was specifically decided in the case of *West Virginia & Maryland Gas Company* v. *Towers*, 134 Md. 137, 106 Atl. 265, that the constant movement of gas cannot, of itself, keep the gas in interstate commerce. The court said, "There may be a constant movement of the molecules of the gas, but we do not see how this movement, because of the peculiar properties of the article, can affect the question to be determined." The court, in *South Carolina Power Company* v. *Tax Commission*, 52 Fed. (2) 515, with respect to the constant movement of electric energy said, "While electric current can hardly be said to 'come to rest' within a state, its interstate journey ends at the transformer which uses it for the production of low voltage current for use within the state." Upon the same principle the interstate movement of gas would end at the regulator which changes the gas from high to low pressure.

This Court had to contend with the same question in the case of *Atlantic Coast Line Ry. Company* v. *Standard Oil Company*, 275 U. S. 257. Mr. Chief Justice Taft, speaking for the Court, said, "It may be as suggested in argument that oil is being discharged into plaintiff's receptacles

for its storage, at the same time that it is being discharged from the storage tanks into tank cars for distribution, but this is not at all inconsistent with its being a closing of interstate or foreign transportation and the beginning of intrastate distribution.''

V.

The contracts between appellant and its industrial pipe line customers can not change the gas sold them from intrastate commerce to interstate commerce.

Another circumstance relied upon by appellant to keep the gas sold to its industrial pipe line customers in the channels of interstate commerce, notwithstanding its treatment after reaching the state, is that the gas is delivered to such customers under contracts made in Louisiana. Of the 415 pipe line customers, appellant has contracts with the forty industrial consumers and the two distributing companies referred to herein as the industrial pipe line customers. These contracts have heretofore been referred to. They are not essentially different from those involved in *Atlantic Coast Line Ry. Company* v. *Standard Oil Company,* 275 U. S. 257.

In the case referred to, approximately 95 per cent of the oil sold by the plaintiff was on contracts made before the oil had been shipped from its point of origin. It was ordered and shipped into the state for the purpose of fulfilling these contracts. Most of the contracts were for a period of a year covering the requirements of plaintiff's various customers, with the average monthly deliveries stipulated. In actual practice deliveries were accommodated to the customers' needs. There was no separation of the

oil under contract from that not under contract, both being of the same grade. The court held that the contracts did not, of themselves, keep the commodity involved in the channels of interstate commerce, and further said that, "mere billing or forms of contract cannot change the essential characteristics of a transaction." It is not within the power of the parties by the form of their contract to convert what is a local business, subject to local regulation, into an interstate business. *Browning* v. *Waycross*, 233 U. S. 16.

In the case at bar, a mass of gas is sent into Arkansas for the purpose of supplying the demand made upon the Arkansas system by its customers. No particular part of this mass is appropriated to any particular contract or ear-marked, labeled, or set aside for any particular customer. *No part of the mass is ever free from the chance of being delivered to or used by non-contract customers.*

On page 17 of its brief appellant admitted that the sales to the Arkansas Power & Light Company were made pursuant to contracts previously entered into and that deliveries were made through city distribution plants. Recognizing that the contracts could not change physical facts and circumstances attending the sale and delivery of gas to this customer, appellant abandoned the contention that the sales to this customer were made in interstate commerce. If the contract is controlling, why did it do so? If the contract can change the essential characteristics of the transactions whereby gas is sold and delivered to the industrial pipe line customers, a contract could have had the same effect with respect to the sales to the Arkansas Power & Light Company.

The rule announced by this court is that if all other attendant circumstances characterize a transaction as being in intrastate commerce, contracts, billing, or place of payment cannot change this characterization.

VI.

Supplying natural gas to local consumers is a local business subject to local regulation.

Early in the history of pipe line transportation of natural gas, this Court announced a rule from which it has not departed, but has many times reaffirmed, which alone, and without the aid of the original package doctrine, places the sale of gas to the industrial pipe line customers who are consumers in the field of local regulation. The rule was announced in *Public Utilities Commission* v. *Landon*, 249 U. S. 239, 245, and reads: "The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains, and that is so whether the local distribution is made by the transporting company or by independent distributing companies. In such cases the local interest is paramount and interference with interstate commerce, if any, indirect and of minor importance." Each of the industrial pipe line customers is a local consumer of gas, with the exception of the Camden Gas Company and the Consumers Gas Company.

The sales to the industrial pipe line customers who are consumers are certainly subject to local regulation under the authority just referred to.

This rule was followed and applied by the Court in the cases of *Missouri ex rel. Barrett* v. *Kansas Natural Gas*

Company, 265 U. S. 298; *East Ohio Gas Company* v. *Tax Commission*, 283 U. S. 465, and *Southern Natural Gas Corporation* v. *Alabama*, 301 U. S. 148.

CONCLUSION

It is submitted *first* that because the large compressed volume of gas transported into Arkansas by the appellant is broken, divided and relieved of much of its pressure, and thereafter is forced into local, subsidiary, spur and supply lines for indiscriminate use and delivery upon demand to the 415 pipe line customers at widely separated points, the interstate movement of the gas delivered to each of the pipe line industrial customers is ended before the state asserts its regulatory powers, and therefore the sales of all gas in Arkansas by the appellant, including that sold to the two distributing corporations, are subject to state regulation.

It is submitted *secondly* that the sales to each of the pipe line industrial customers are transactions in intrastate commerce, and are subject to local regulation because of the analogy between appellant's pipe line system in Arkansas and a city distribution plant.

It is submitted *thirdly* that in any event, the state has jurisdiction to regulate the sale of gas to the forty pipe line industrial customers who are consumers.

For the reasons stated, the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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